No. 6540

In the Supreme Court of the United States

October Term [redacted] 1961

DAVID D. BECK,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

REPLY BRIEF OF PETITIONER ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

CHARLES S. BURDELL
929 Logan Building
Seattle 1, Washington

JOHN J. KEOUGH
Central Building
Seattle 4, Washington
Counsel for Petitioner

FRAYN PRINTING COMPANY

No. 665

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REASONS FOR GRANTING CERTIORARI

This Court need not consider this case merely for the benefit of Petitioner alone. The case is one which will have significant effect upon criminal procedure in state courts and particularly in the State of Washington.

This is not to deny that petitioner, for his own benefit, desperately requires consideration of his case by a court which will apply fundamental standards of due process and equal protection.

The fact that this case is merely a $1900 larceny case does not diminish its importance to this Court.* Cf. *Thompson v. Louisville,* 362 U. S. 199. Bad decisions make bad law which stands as precedent to be applied in subsequent cases which may involve more serious offenses, and which may involve defendants whose conviction is not so widely sought as in this case.

This case involves denial of due process and equal protection by methods which have not been specifically considered by this Court and which, we believe require full review and decision for the guidance of other litigants in cases arising in state courts.

Among the questions raised by the procedure in this case, and by Respondent's brief, which require consideration by this Court are the following:

(1) Is the Federal constitutional right to an impartial grand jury (*Cassell v. Texas,* 339 U. S. 282) limited to minority racial groups? See Resp. Br. 14. If so, was Respondent a person or member of a group entitled to this right? Four judges of the Supreme Court of the State of Washington, despite *Cassell* and related cases, denied that there was any federal constitutional right to an impartial grand jury. Having taken this position, it was unnecessary for them to determine whether or not petitioner was a person or member of a group entitled to the right recognized in *Cassell* and similar cases.

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* At the conclusion of the 34-page opinion of the four judges who favored affirmance, the point was made that petitioner's case was a "nineteen hundred dollar grand-larceny-by-embezzlement case." See Appendix to Petition herein, pp. 34-35. It appears that there is an implication that because of the relatively small sum of money involved, Petitioner was not justified in asserting so many and novel issues.

(2) Where the Supreme Court of the State of Washington is divided and, accordingly, cannot determine or decide the State of Washington law, must Petitioner be imprisoned while the Legislature of the State of Washington decides what the law is?

(3) Where the Washington Supreme Court cannot determine what the Washington statutes prescribe, and where a federal constitutional question is involved, is this Court prohibited from determining Petitioner's rights under the federal constitution and under Washington law? See Res. Br. 13.

FEDERAL QUESTIONS ARE INVOLVED

Selection of the Grand Jury and Conduct of Prosecuting Attorneys

This Court has repeatedly "adhered to the view that valid grand jury selection is a constitutionally protected right." *Reece v. Georgia,* 350 U. S. 87; *Cassell v. Texas,* 339 U. S. 282; *State v. Pierre,* 306 U. S. 354. Respondent flatly argues that there is "no Federal Constitutional right to an impartial grand jury" (Res. Br. 11) despite the language of this Court in *Cassell v. Texas,* 339 U. S. 282-283 which specifically refers to the "federal constitutional right to a fair and impartial Grand Jury." The Respondent and the courts of the State of Washington have ignored these principles throughout this case.

Trial in an Atmosphere of Prejudice and Hostility

This Court has repeatedly held that the Fourteenth Amendment to the United States Constitution requires that *state court* proceedings be conducted in an atmosphere of fairness and impartiality. *Moore v. Dempsey,* 261 U. S. 86; *Shepherd v.*

Florida, 341 U. S. 50; *Stroble v. California*, 343 U. S. 181; and see *Marshall v. United States*, 360 U. S. 310; *Michelson v. United States*, 335 U. S. 469; *"The Public Trial and Free Fress,"* 46 A.B.A.J. 840 (August 1960).

Appellate Proceedings in Violtaion of State Constitution and Statutes

This Court has also held that state appellate procedure must be conducted in a manner which does not violate the guarantee of equal protection provided by the Fourteenth Amendment to the United States Constitution, and by a method which is clearly defined. *Eskridge v. Washington State Board of Prison Terms and Paroles*, 357 U. S. 214; *Young v. Ragen*, 337 U. S. 235.

DENIAL OF DUE PROCESS AND EQUAL PROTECTION

Petitioner's Right to an Impartial and Unbiased Grand Jury

The following facts are undisputed: At the time of the impanelment of the grand jury, Petitioner was the subject of accusations of crime and misconduct by a Senate Committee. These accusations were widely circulated by all news media. The court which impaneled the grand jury in the Petitioner's case reminded the grand jurors of the "disclosures" made in the Committee proceedings. The accusations made by the Committee were of such common knowledge in the community that the court, before reminding the grand jurors of the "disclosures" of the Committee remarked that it seemed "unnecessary to review the recent testimony before the Sen-

ate Investigating Committee" St. 2175-2176. The court incorrectly advised the grand jury that Petitioner had stated that the funds which he received and for which he was indicted were a loan. The Petitioner was specifically identified, by name and title, as the person under investigation.

The charge to the grand jury was framed in terms which would create prejudice against Petitioner, or increase the prejudice which (unless we ignore realities) already existed toward Petitioner.

The court took *no steps whatsoever* to determine whether any of the grand jurors were prejudiced against the Petitioner as a result of these hearings or the court's reference thereto, or for any other reason. The grand jury was not even instructed to *attempt* to act impartially.

Petitioner submits and has consistently contended that in the selection of the grand jury he was entitled to at least some minimum protection against bias and prejudice, particularly in view of the fact that the impanelment took place amidst violent and widespread accusations against Petitioner by persons of high rank and standing. At the very least, the trial court should not have reminded the grand jurors of the extra-judicial accusations which were then currently being circulated. See Petition herein, pp. 28-36.

In the State proceedings, this argument was raised and summarily dismissed by the trial court. The four judges of the Supreme Court upon whose opinion Petitioner is to be imprisoned (although the other four judges disagree) answer Petitioner's argument by stating that there is no longer any

right, federal or state, to an impartial grand jury.* Indeed, these judges assert that the grand jury is no longer intended to be "a shield against the zealous prosecutor, as in times past . . . ". Appendix to Petition herein, p. 3. The frightful misconception of the State Supreme Court in this connection is illustrated by a comparison of its views with those of this Court in *Hoffman v. United States,* 341 U. S. 479. In that case, speaking for the Court, Justice Clark stated that in grand jury proceedings there was (341 U. S. 485):

> ". . . continuing necessity that prosecutors and courts alike be 'alert to repress' any abuses of the investigatory power invoked, bearing in mind that while grand juries 'may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire . . . whether a crime cognizable by the court has been committed,' *Hale v. Henkel,* 201 U. S. 43, 65, 50 L.ed 652, 661, 26 S.Ct. 370 (1906), yet 'the most valuable function of the grand jury [has been] not only to examine into the commission of crimes, but to stand between the prosecutor and the accused.' Id. 201 U. S. at 59."

Respondent apparently contends that the federal right to an impartial grand jury is limited to members of a minority racial group. Res. Br. p. 14. But in *Hernandez v. Texas,* 347 U. S. 475, 477, this Court pointed out that the doctrine of equal protection extends beyond the bounds of race or color. The question now is: Does a group composed of officials of a labor union who are under intensive public

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* The assertion that the rule relating to selection of grand jurors is different because in the State of Washington accusation may also be made by Information is discussed in the section of this brief relating to the adequacy of the State grounds for affirmance of the conviction.

scrutiny and criticism by a Senate Committee* have an equal right to an impartial grand jury? Whether Petitioner was a member of a group entitled to the guarantee of equal protection was a question of fact. *Hernandez v. Texas,* 347 U. S. 475, 478. The courts of Washington did not consider or decide this question. Having postulated that Petitioner in no event had a right to an impartial grand jury there was no need to do so.

Respondent also urges, apparently, that the impanelment of the grand jury in this case was valid because members of a minority racial group were not "systematically excluded." Resp. Br. 14. But, as demonstrated in *Hernandez,* systematic exclusion is simply a method (but not the only method, see *Cassell v. Texas,* 339 U. S. 282, at 290) of proving discrimination; and discrimination, as shown in *Cassell,* violates the "federal constitutional right to a fair and impartial Grand Jury."

In Petitioner's case proof of discrimination or proof of prejudice were not issues because the State of Washington, from the beginning of the case, denied Petitioner's right to protection against prejudice in the grand jury. Indeed, the State, by action of both the trial court and the prosecutors, helped to create prejudice.

If the State had recognized Petitioner's right to an impartial grand jury, the State courts would not have required that the discrimination, or prejudice, be established by a process of systematic exclusion

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* The trial court referred to Petitioner specifically by name and as "president of the Teamsters Union" and also included Petitioner in the group described by the Court as "officers of the Teamsters Union" (St. 2175-2176).

or by any specific method. Before Beck, the rule in Washington was that grand jurors must be impartial and unbiased, and it was the duty of the trial court to select or exclude jurors on an individual basis, for the purpose of "insuring that qualified and impartial grand jurors are secured." *State v. Guthrie*, 185 Wash. 464, 56 P. 2d 160; *State ex rel Murphy v. Superior Court*, 82 Wash. 284, 144 Pac. 32. But with Beck, protection against prejudice was withdrawn, and perforce methods of proving prejudice became irrelevant.

Misconduct of Prosecuting Attorneys in Grand Jury Proceedings

The conduct of the prosecuting attorneys in the Grand Jury room is in part set forth in Appendix A to the opinion of the four judges of the Supreme Court of Washington who were in favor of reversal of Petitioner's conviction. See Appendix to Petition herein, pp. 52-62. The conduct was grossly improper under any standard of conduct.

Measured by the conduct which this Court condemned in *Berger v. United States*, 295 U. S. 78, the conduct of the prosecutors constituted gross and prejudicial misconduct; and in this case the misconduct was particularly prejudicial because, having been committed in secret, it was not subject to corrective instruction by any court.

A prosecuting attorney is a state officer, and misconduct on the part of a prosecuting attorney constitutes a violation of the Fourteenth Amendment. See *Mooney v. Holohan*, 294 U. S. 103. Moreover, the conduct clearly violated Petitioner's right to impartial consideration of his case by the grand jury.

Denial of Motions for Continuance and Change of Venue

It is undisputed that under the federal Constitution, Petitioner should not have been compelled to submit to trial in an atmosphere of prejudice and hostility. See Petition herein, p. 36-41. In its brief, Respondent inaccurately summarizes the record and disregards the elements of a fair trial. Thus:

(1) Respondent asserts that "Petitioner cites" only four instances of publicity in Seattle which occurred between the indictment and the trial. Res. Br. 16-17. Respondent should have advised the Court that the instances cited by Petitioner were only illustrative. The record contains countless additional examples of newspaper publicity extremely hostile to Petitioner, as well as sworn testimony relating to adverse and intensive television and radio publicity, much of which occurred after the indictment and prior to the trial. St. 2250-2340.

(2) Neither Respondent nor the State Supreme Court considered the fact (now uniformly recognized) that prejudice is frequently subconscious. No consideration whatsoever was given to the fact that a fact finder is often unable to determine whether or not he has become prejudiced by what he has seen and heard. And no consideration was given to the fact that in this case the constant accusations against the Petitioner to which the community was exposed were made by persons of high rank and standing in the United States. See *Pennekamp v. Florida*, 328 U. S. 331, 357; See also 63 *Harvard Law Review* 840; 34 *New York University Law Review*, 1278; *Marshall v. United States*, 360 U. S. 310.

(3) Respondent asserts that the crime involved was not the type which would inflame the community so as to prevent a fair trial. Here, however, the prejudice toward Petitioner was not created by the nature of the offense, but by proceedings of a United States Senate Committee which the state courts disregarded completely in ruling upon Petitioner's motions for continuance and change of venue.

(4) The only finding of fact made by the trial court was that Petitioner could obtain as fair a trial in December 1957 as he could in May 1958, the date to which a continuance was requested. See Res. Br. 16. We submit that Petitioner was entitled to *the chance* that the hostility against him would subside by May 1958.

(5) Respondent argues that no person "should be granted immunity from criminal process by the fact that the various news media consider him newsworthy." Res. Br. 17. Petitioner did not seek immunity. He merely sought a reasonable continuance or change of venue in order to avoid the effect of bitterly hostile accusations which were circulated throughout the community with a degree of intensity and repetition which is surely unparalleled and which rarely, if ever, has been presented to this Court or any court. Here the extra-legal accusations were not isolated instances which merely by chance came to the attention of some members of the community. They were repeated and continuous, and resulted from an intended and designed program to bring Petitioner's alleged wrongdoings to the attention of the entire community.

Discrimination Against Petitioner in Appellate Proceedings

Under the Constitution of the State of Washington petitioner was entitled to the right of appeal (Article I, § 22, Amendment 10, Washington State Constitution). Under the Fourteenth Amendment to the United States Constitution he was entitled to a "clearly defined method" of raising his claim of denial of federal rights. *Young v. Ragen,* 337 U.S. 235, 239; *Carter v. Illinois,* 329 U.S. 173. In connection with submission of his appeal, he was also entitled, under the Fourteenth Amendment, to due process and equal protection of law. *Eskridge v. Washington State Board of Prison Terms and Paroles,* 357 U.S. 214.

The Constitution of the State of Washington, as well as the statutes relating to appeal and the Rules of the Supreme Court of the State of Washington, require that all cases on appeal shall be decided by a majority of the judges to whom the case is submitted. See Petition herein, pp. 9-11. The right to a decision by the majority of the judges, as provided therein, was denied to Petitioner. Only four of the eight judges who heard the case favored affirmance of the conviction. Unless this Court acts, Petitioner will be imprisoned by the State of Washington upon the opinion of four judges whose acts are not authorized by any constitutional or statutory provision and which were in fact directly contrary to the applicable constitutional and statutory provisions.

It is conceded by Respondent that a divided opinion by the State Supreme Court does not change or even determine the law in the State of Washington. Res. Br. 13. Accordingly, defendants in other

future criminal cases, as they have in the past, may continue to rely upon the constitutional and statutory provisions which require the right of majority decisions. Petitioner was not accorded that right.

PURPORTED ADEQUACY OF STATE GROUNDS

In *Wolfe v. North Carolina,* 364 U.S. 177, this Court stated (p. 185):

> "It is settled that a state court may not avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forward non-federal grounds of decision which are without any fair or substantial support."

This Court, and not the courts of the State of Washington, is vested with the right and duty to determine whether rights guaranteed by the United States Constitution have been violated. *Dixon v. Duffy,* 344 U.S. 143. This rule is applied even when determination of the question involves issues of fact. *Cassell v. Texas,* 339 U.S. 282; *Hernandez v. Texas,* 347 U.S. 475.

Selection of the Grand Jury

The four judges of the State Supreme Court who favored affirmance of Petitioner's conviction argued that there was no right under state law to an impartial grand jury because accusation in the State of Washington may be by Information as well as by Indictment. Appendix to Petition herein, p. 2. But there was no dispute of the fact that in this case the accusation was by Indictment, and it is not suggested that if the grand jury had not indicted, the prosecuting attorney would have accused Petitioner by Information. Neither is it suggested that the prosecuting attorney would have had any right

to act in a venal manner or to accuse Petitioner by Information except in his capacity as a quasi-judicial officer which, presumably, means that the prosecuting attorney would have acted fairly and in accordance with fundamental standards of justice.

Respondent in its brief does not adopt the argument of these judges. No doubt Respondent recognizes that accusation by a biased institution cannot be defended by the suggestion that some other agency or institution *might* have initiated the accusation. Nothing in the law of Washington would permit this.

The judges in favor of affirmance also seem to say that an invalid grand jury can be cured by a fair trial. Appendix to Petition, p. 4. No law of the State of Washington permits this assumption, and this reasoning has never been applied by this Court in cases involving the validity of grand juries. In Petitioner's case, the proceedings of the invalid grand jury were in fact used at the trial. Thus, the trial itself was infected by the proceedings of the invalid institution which accused Petitioner.

In the Petition herein reference was made to Sec. 10.28.030 of the Revised Code of Washington which expressly contemplates that grand Jurors shall act impartially and without prejudice. Respondent, in an attempt to meet this problem, refers to Sec. 10.28.130 of the Revised Code of Washington which permits a grand juror to report the knowledge of a crime to his fellow jurors. Apparently Respondent is urging that because a grand juror has knowledge of a crime and reports it to his fellow jurors, the grand jury can thereupon act as

a biased and prejudiced institution. Naturally this conclusion does not follow; but any doubt about it is resolved by the very next section of the Revised Code of Washington (Sec. 10.28.140) which provides that a complainant who institutes a prosecution may not be present at the deliberations of a grand jury and may not vote for the finding of an Indictment.

Until Petitioner's case there could have been no doubt that the law in the State of Washington required that the grand jury be a fair and impartial body. See Petition herein, pp. 31-32. Now, because of the divided court in Petitioner's case, Respondent states that the law in the State of Washington on this point cannot be determined, and Respondent even asserts that the fact that the law cannot be determined is binding on this Court. Respondent says that the Legislature of the State of Washington, and not this Court, must answer the question.

We submit that this Court should not accede to the notion suggested that it refuse to act while Petitioner goes to prison and the State of Washington decides its law. This is a question of federal due process, and if the State of Washington cannot decide what its law is, then this Court may certainly do so. Surely four judges of the State Supreme Court, whose opinion admittedly does not determine Washington law, cannot be permitted to imprison Petitioner while the State of Washington settles the law. The fact is that the law in the State of Washington *is* clear. By statute and decision Washington has declared that the grand jury is an impartial body, and Respondent concedes that the opinion of four judges cannot change this law. Indeed, Section 4.04.010 of the Revised Code of Washington

provides that the common law, where not inconsistent with the constitution and the laws of the United States or the State of Washington, shall be the rule of decision in all courts of the State. Under the common law a prospective defendant was entitled to a fair and impartial grand jury. (See Petition herein, p. 30).

Denial of Motions for Continuance and Change of Venue

Nothing in the law of the State of Washington permits trial in an atmosphere of prejudice and hostility. The record in the case overwhelmingly demonstrates the existence of a continued and intensive program to inform the community of the "crimes" of Petitioner. To say that this program did not affect the attitude of the entire community toward Petitioner would be pure nonsense. By affidavit of fact and opinion Petitioner demonstrated that it would be impossible for him to obtain a fair trial. The record overwhelmingly supports the facts and opinions stated in the affidavits, and the affidavits were uncontroverted. Prior to Petitioner's case the law in Washington was that a defendant was entitled as a matter of right to a change of venue upon an uncontroverted affidavit stating that a fair trial was impossible. *State v. Hillman,* 42 Wash. 615, 85 Pac. 63. This rule was not applied in Petitioner's case.

In any event, upon the contention that Washington has violated the due process clause of the Fourteenth Amendment, this Court must make an independent determination of the undisputed facts. See *Stroble v. California,* 343 U. S. 181, 190; *Dixon v. Duffy,* 344 U. S. 143. This should be particularly true where, as here, the circulation of hostile pub-

licity was so continuous and intensive as to create a strong presumption of prejudice.

Appellate Procedure

No statute, decision or theory of law in the State of Washington permits affirmance of a conviction in a criminal case by a divided court. The Constitution of the State provides for the right of appeal in criminal cases, but not in civil cases. Article I, § 22 (Amendment 10).

Respondent cites a number of decision of the Supreme Court of the State of Washington which affirm, by equal division, the decisions of trial courts in *civil* cases. Res. Br. 10. These cases specifically declare, however, that the practice of affirmance by a divided court is not inflexible and that affirmance in such cases is warranted only by the exercise of discretionary measures; and the practice of affirming civil cases by a divided court is a rule of expediency. See *Serra v. National Bank of Commerce*, 27 Wn. 2d 277, 178 P2d 303.*

In criminal cases, where there is a constitutional right of appeal, the Washington Supreme Court

* In several states affirmance of conviction by a divided court is permitted, on varying theories. In some cases it is permitted by statute. See *Lott v. Pittman*, 243 U. S. 588. In some cases the affirmance is based upon common law, although even in such cases the practice is modified or limited. Thus, in New Hampshire the practice is limited to civil cases and misdemeanors. See *State v. Perkins* (1873) 53 N. H. 435. In Washington the common law rule does not apply in criminal cases because in Washington there is a constitutional right of appeal. There was no such right in common law. See *McKane v. Durston*, 153 U. S. 684. Moreover, in Washington the rules of common law apply only when they do not contravene the Constitution and laws of the State of Washington. See § 4.04.010, Revised

has no authority or jurisdiction to adopt discretionary methods or rules of expediency, or common law principles, in arriving at its decisions. Civil cases provide no authority for such practice because in Washington there is no constitutional right of appeal in civil cases; and rules of discretion and expediency do not provide the standards of equal protection and definitive methods of appeal to which a defendant in a criminal case is entitled. When will the court exercise its discretion in favor of affirmance and when will it not do so? Why, in certain instances, should the court not exercise its discretion in favor of reversal? In short, when will the right of appeal be granted and when will it not be granted? In the *Serra* case, *supra,* the court affirmed a decision in a civil case because it was "expedient" to do so in the interest of the parties. We submit that in a criminal case affirmance of conviction should not be based upon expediency. If expediency is the test, as good an argument can be made for reversal. The interest of the public will in no way be furthered by a decision which, for want of something better, decides no principle of law and creates no precedent and accomplishes nothing more than to imprison a defendant with-

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Code of Washington. In some states affirmance by a divided court is based upon a presumption that the rulings of the trial court were correct. This presumption, however, is a presumption of fact not of law. See *Ellerbeck v. Haws,* (Utah 1958) 265 P.2d 404. In Washington, application of this presumption would deny the right of appeal because it would merely constitute an adoption of the rulings of the trial court, or in effect make the trial court the deciding judge. In some states, it is held that the judges in favor of reversal have a duty to join with those in favor of affirmance. See *State ex. rel Hampton v. McClung* (1904), 47 Fla. 224, 37 So. 51. This theory has never been applied in Washington, even in civil cases.

out an appeal in the manner provided by the Washington constitution and statutes.

The fundamental violation of due process and equal protection which is involved in appellate procedure of this nature is demonstrated by Respondent's concession that the effect of the Supreme Court opinions in this case is to leave undecided the law of the State of Washington concerning the right of a defendant to an impartial grand jury. Respondent is compelled to urge that because Washington cannot determine its law, Petitioner must be imprisoned until the Legislature determines the law. This Court, says Respondent, has no right to determine the question. Res. Br. 13. Thus, four judges of the State Supreme Court, acting contrary to the Constitution and laws of the State, are being permitted to imprison Petitioner even though it is conceded that these four judges have not determined the Washington law on a critical issue in the case. This itself, we submit, would violate Petitioner's right to due process and equal protection under the Fourteenth Amendment.

The Legislature of the State of Washington has in fact acted since Petitioner's case. House Joint Resolution 6, enacted on March 9, 1961, provides for the appointment of temporary judges to the State Supreme Court when necessary to the orderly administration of justice. A constitutional amendment will be necessary to effectuate this proposal. This resolution was enacted to insure compliance with the existing provisions of the Constitution and laws which require that decisions of the Supreme Court shall be by majority of the judges. See Appendix hereto, pp. 9a and 10 a.

CONCLUSION

We submit that this case involves questions which urgently require review by this Court.

Respectfully submitted,

CHARLES S. BURDELL
929 Logan Building
Seattle 1, Washington

JOHN J. KEOUGH
Central Building
Seattle 4, Washington

Counsel for Petitioner